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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~907~~ 71

LUIS ALVARA CEBALLOS (Y ARBOLEDA),

Petitioner,

against

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service at the Port of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, which affirmed a judgment of the United States District Court for the Southern District of New York, dismissing the petitioner's complaint in which he had sought judicial review, pursuant to Section 10 of the Administrative Procedure Act of 1946 [5 U. S. C. §1009], of a final administrative order directing that he be deported and barring him from having the suspension of his deportation considered by the Attorney General of the United States under Section 19 (c) of the Immigration Act of 1917 by holding that petitioner was ineligible for naturalization and therefore statutorily ineligible for suspension of deportation.

Opinions Below

The opinion of the District Court is reported in 130 F. Supp. 30 and it is incorporated in the record at pages 23a to 27a. The opinion of the Court of Appeals is reported in 229 F. 2d 592; a copy of the opinion and judgment is hereto annexed as Appendix A.

Jurisdiction

The judgment of the Court of Appeals was rendered on February 6, 1956. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. §1254(1).

Questions Presented

1. Whether the Attorney General and/or Commissioner of Immigration are indispensable parties to a suit, under 5 U. S. C. §1009, where effective relief without requiring action by either the Attorney General or the Commissioner can be afforded petitioner, by a finding and declaration by the court,

   (a) that the petitioner is not ineligible for naturalization under 50 U. S. C. (1946 Ed.) §303(a) and 50 U. S. C. App. §454(a) and, therefore, not statutorily ineligible for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended [8 U. S. C. (1946 Ed. Supp. V) §155(c)];

   (b) that the order for his deportation is invalid by reason of the fact that his application for suspension of deportation was not considered because of an erroneous administrative determination that he was statutorily ineligible therefor; and

   (c) that respondent is restrained and enjoined from deporting petitioner under the outstanding order of deportation.

2. Whether by the mere signing of an *Application by Alien for Relief from Military Service*, DSS Form 301, the petitioner has forfeited the right to naturalization, rendering him ineligible for suspension of deportation where such application was not acted upon by the local draft board, and he was not classified as exempt under such application nor relieved from liability for service by reason thereof, as required by law and the rules and regulations of the Selective Service System (32 C. F. R. Cum. Supp. 1939-43).

Statutes Involved

The relevant portions of the statutes involved are as follows:

8 U. S. C. (1946 Ed. Supp V) §155(c)[1] [Sec. 19(c) of the Immigration Act of 1917 as amended].

> In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the attorney general may * * * (2) suspend deportation of such alien if he is not ineligible for naturalization * * * if he finds (a) that such deportation would result in serious economic detriment to a citizen * * * who is a spouse, * * * or minor child of such deportable alien; * * *.

50 U. S. C. App. (1946 Ed.) §303(a)[2] [Sec. 3(a) of the Selective Training and Service Act of 1940 as amended].

> Except as otherwise provided in this act, every male citizen and every other male person residing in the

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1. Now 8 U.S.C. §1254(a)(1).
2. Now 50 U.S.C. App. §454(a).

United States, who is between the ages of 21 and 45 * * * shall be liable for training and service in the land and naval forces of the United States: *Provided*, that any citizen or subject of a neutral country shall be relieved from liability for training and service under this act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *

8 U. S. C. §1426 [Sec. 315 of the Immigration and Nationality Act of 1952].

Citizenship denied alien relieved of service in armed forces because of alienage; conclusiveness of records.

(a) Notwithstanding the provisions of section 405 (b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien.

Statement of the Case

The petitioner is an alien, 42 years of age, a native of Colombia (R. 9a, 88a). He is married to a native-born United States citizen and is the father of two citizen children, boys, now aged 4½ and 2 years.[3] He is a cultured man of considerable business acumen, the president of a New York export-import company, and earns a substantial income (R. 84a). It is conceded that he is a man of good moral character with an unblemished record (R. 79a, 83a, 92a). He lives with his family in a home which they own in New Rochelle, New York. He is the sole support of his wife and infant sons. It is also conceded that his deportation would cause serious economic detriment to them (R. 9a, 83a, 88a).

The petitioner's marriage took place in New York City on January 3, 1951. (R. 79a, 83a). Together with his wife, he traveled to Europe and returned on April 2, 1951. He was lawfully admitted until April 23, 1951 on a transit visa, in transit to Mexico where he had then been residing (R. 77a, 83a). The petitioner's intention to continue on to Mexico changed as a result of the condition of his wife, then pregnant, who became seriously ill after their entry. Her illness made further travel hazardous for her. Her pregnant state made her unwilling to leave her native land, where she had lived all her life, to bear her children on foreign soil. (R. 46a, 48a). Because of his wife's condition and attitude, the petitioner, on April 20, 1951, applied to the New York District of the Immigration and Naturalization Service to adjust his status to that of a permanent resident under 8 U. S. C. §155(c) [Sec. 19(c) of the Immigration Act of 1917]. Deportation proceedings were commenced against him immediately upon the expiration of his transit

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3. A third child has since been born and is now almost six months old.

visa on the ground that he was in the United States in violation of Sections 14 and 15 of the Immigration Act of 1924 in that, after his admission into the United States on a transit visa, he failed to maintain the transit status under which he was admitted (R. 3a). In those proceedings, he applied, as was his right, under 8 U. S. C. (1946 Ed. Supp. V) §155(c), for suspension of deportation, authorized by the statute where a deportable alien is of good moral character and not otherwise ineligible for naturalization and where deportation would result in serious economic detriment to a citizen spouse or minor child. (R. 88a).

The petitioner was administratively found to be deportable in that he remained in the country beyond the period for which he had been admitted. (R. 86a). He was further held to be statutorily ineligible for suspension of deportation by reason of being statutorily ineligible for citizenship, because, after registering pursuant to the Selective Service Act during a prior residency in the United States, "on August 26, 1943, he signed DSS Form 301, 'Application by Alien for Relief from Military Service.'" (R. 10a, 83a, 84a). On January 25, 1954, he was ordered to depart voluntarily from the United States within a period to be prescribed by the District Director, and upon failure to so depart, "without further notice or proceedings [to] * * * be deported from the United States in the manner provided by law." This order was affirmed by the Board of Immigration Appeals on October 19, 1954 (R. 98a). The petitioner's motion to the Board to reconsider was denied on February 17, 1955. (R. 102a). On March 9, 1955, the petitioner was directed by the respondent to depart by April 11, 1955.[4] (R. 15a).

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4. The Government, in the District Court, represented that it would take no action to effectuate this order, pending disposition of the litigation in that court. It has, to the present time, refrained from taking any such action.

The petitioner had signed the DSS Form 301: *Application by Alien for Relief from Military Service,* under the following circumstances. He had been lawfully admitted to the United States for permanent residence on February 24, 1942. Three months after his admission, he registered for the draft as required by the Selective Service Act of 1940, filling out the prescribed questionnaire, designated DSS Form 40. After registration, he inquired of his local draft board as to the possibility of his being placed in a Columbian or general Latin American group, which he understood was being formed within the United States Army. He was informed that his desire for such an assignment would be considered and that notification of the disposition of his request would be sent to him.

In June, 1943, over a year after his registration, the petitioner received, in the mail, from his local draft board, two sets of forms, DSS 304: *Alien's Personal History and Statement,* and DSS 302: *Application for Determination of Residence.* The petitioner filled out both forms, by typewriter, except for one item: No. 41 on Form 304. This item he left unanswered. He brought both forms to his local draft board, and before filing them, discussed again his request for assignment to a Colombian unit. In this connection, he was advised to insert the word "*do*" in the blank space in the unanswered item No. 41. He then and there, in his handwriting, complied with the suggestion made.

Item No. 41 was a printed statement, and as filled in by the petitioner, read:

> "I *do* [written in] object to service in the land and naval forces of the United States."

It also contained the following notice:

> "* * * If you are a citizen or subject of a neutral country and you do not wish to serve in the land or

> naval forces of the United States, *you may apply to your Local Board for an application by alien for relief from military service* (Form 301) which, when executed by you and filed with the Local Board, will relieve you from the obligation to serve in the land and naval forces in the United States, but will also debar you from thereafter becoming a citizen of the United States." [Emphasis added.]

The petitioner, at the time he filed Form 304 and filled in Item No. 41 in the manner suggested, *did not apply* to his local board for an application to be relieved from military service (DSS Form 301), nor did he execute such an application. However, two months later, unsolicited, the draft board on its own initiative, sent him, by mail, a set of DSS Forms 301 completely filled out with instructions to sign and return them to the draft board.

The petitioner went with the forms to his draft board and, after further discussion there, signed them at the draft board with the understanding that this was the procedure required by the draft board to consider his request for assignment, if feasible, to a Colombian or other Latin American contingent. He returned home to await further instructions.

The petitioner never received any notice of action taken on the application, DSS Form 301, and in fact, his selective service record discloses that he was never classified IV-C, the category of an alien who was declared by the Selective Service to be exempt or relieved from military service because of having executed a DSS Form 301. On the contrary, in January, 1944, the petitioner received notice from his board that he had been classified I-A and instructed to appear for a pre-induction physical examination. After examination, he was rejected as physically unfit for service due to a chronic kidney ailment. In March, 1944, he was reclassified IV-F (R. 10a, 14a, 30a, 44a, 65a, 74a).

After the IV-F classification, with permission of the draft board, and until April, 1951, the petitioner traveled to Mexico continually and was permitted to reenter the United States each time without let or hindrance (R. 41a, 71a). Since the commencement of these proceedings against him, he has resided continuously in the United States with his wife and children (R. 77a).

The instant action was begun in the United States District Court for the Southern District of New York to secure a declaration that the petitioner is not statutorily ineligible for suspension of deportation in that, as a matter of law, he is not debarred from citizenship. A declaration was also asked that the order of deportation against the petitioner is invalid and ineffective unless and until, having thus removed the administrative ruling which creates a statutory bar to consideration of his application for suspension of deportation by the Attorney General, such consideration is had and a determination adverse to the petitioner made. The action sought also the auxiliary relief of an injunction against the petitioner's deportation under the deportation order, unless or until the occurrence of such eventualities. Jurisdiction of the Court was invoked under 5 U. S. C. §1009 and 8 U. S. C. §1329.

The District Court did not consider or rule upon the substantive issues. It dismissed the complaint exclusively on the ground "that the Attorney General of the United States and/or the Commissioner [of Immigration] are indispensable parties to the instant action" (R. 25a). The Court below sustained the holding of the District Court, although it conceded that in light of this Court's decision in *Shaughnessy* v. *Pedreiro*, 349 U. S. 48 (1955), "the question is not free from doubt." And, in spite of having thus ousted itself of the jurisdiction to decide the merits of the cause by its own ruling, it nevertheless held that, on the merits the petitioner was not entitled to the relief he requested.

Reasons Why Certiorari Should Be Granted

There are two separate and distinct rulings in the decision of the court below: (1) jurisdictional and (2) substantive. As to both, the lower court's decision presents good cause to move this Court to exercise its discretion in favor of granting the writ of certiorari prayed by the petitioner.

1. *On jurisdiction*: The holding of the Court of Appeals that the Attorney General is an indispensible party to the action commenced by the petitioner is by that court's own admission "not free from doubt" in the light of this Court's recent decision in *Shaughnessy* v. *Pedreiro, supra.* Its resolution of that "doubt" brings the decision into direct conflict with *Shaughnessy* v. *Pedreiro, supra*, and *Williams* v. *Fanning*, 332 U. S. 490 (1947). Moreover, it creates a conflict with decisions of the courts in the Ninth Circuit whose approach to the same subject matter is evidenced by the cases of *Jiminez* v. *Barber*, 226 F. 2d 449 (C. A. 9th, 1955) and *Accosta* v. *Landon*, 125 F. Supp. 434 (D. C. S. D. Calif. C. D. 1954). Were the decision of the Court of Appeals for the Second Circuit to be permitted to stand, it would be precedent for compelling thousands of litigants, under the immigration laws alone, to seek needed relief in the courts of the District of Columbia, although this court itself has indicated that as a practical matter, effective relief may be had against a subordinate official who may be brought before a local court.

2. *On the merits.* The decision of the court below is squarely in conflict with that of *United States* v. *Bazan*, 228 F. 2d 455 (App. D. C., 1955). The law involved was designed to create a privilege, *i.e.* relief of a neutral alien from military service, for which the alien must pay with the forfeiture of another privilege, i.e. his eligibility for United States citizenship. The decision of the lower court so construes the law as to create an unconscionable imbalance in

the administration thereof, avoided by the Court of Appeals for the District of Columbia, in that it imposes the forfeiture whether or not the alien was granted the privilege for which it is to be exacted. Such a harsh and extreme construction of the law, running counter to the general doctrine that the law abhors a forfeiture (*Washingtonian Pub. Co.* v. *Pearson*, 306 U. S. 30, 41; *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10) and which will adversely affect the lives of many aliens throughout the land to whom it can be made to apply, should not be permitted to subsist as a precedent by this Court.

ARGUMENT

1. The Attorney General and/or the Commissioner of Immigration are not indispensable parties to this suit.

A misconception of the district court, perpetuated by the court below as to the right the petitioner seeks to vindicate, the relief which could ameliorate his situation, and the relief he sought, dictated its election to follow *Vaz* v. *Shaughnessy*, 208 F. 2d 70 (C. A. 2d, 1953) rather than *Shaughnessy* v. *Pedreiro*, *supra*, both of which measure the indispensability of parties by the basic standards established in *Williams* v. *Fanning*, *supra*. The decision of this Court in *Shaughnessy* v. *Pedreiro*, took such a view of "practical considerations" which, "under [its] former cases" were made to govern a determination of indispensability of parties, as to eliminate such a choice, as was made by the court below, from judicial cognizance. But whether or not this Court's *Pedreiro* decision is read to supersede the lower court's decision in *Vaz* v. *Shaughnessy*, *supra*, the relief to which the petitioner is entitled and which he requires and seeks sets this action apart from

Vaz, and calls for its determination on the authority of *Shaughnessy* v. *Pedreiro, supra* and *Williams* v. *Fanning, supra.*

The lower courts, in effect, held the Attorney General, in whom the statute rested exclusive power to suspend deportation [8 U. S. C. (1946 Ed. Supp. V) §155, now 8 U. S. C. §1254], to be an indispensable party to this action because he was the sole official who could effect a suspension of the petitioner's deportation. This ruling was apparently based on the mistaken legal notion, developed by the District Court, that to compel the Attorney General to suspend deportation was the "*sine qua non* of effective relief in this situation" (R. 26a) and that, therefore, the petitioner sought to compel the "exercise of [his] discretionary power to suspend deportation" (R. 26a).

The right which the petitioner seeks to enforce by this action, however, is not the ultimate right to have the Attorney General so exercise his discretion as to suspend his deporation—although that might, indirectly, be the inevitable effect of this suit. It was the penultimate right "to an exercise of the Attorney General's discretion on [his] application" for suspension, of which he was deprived "because the Attorney General's subordinates erroneously thought he was 'statutorily ineligible' for suspension of deportation" [*Accosta* v. *Landon*, 125 F. Supp. 434, 441 (D. C. S. D. Calif. C. D. 1954)] and the co-relative right not to be deported because that "condition precedent" to the "effectiveness" of the order of deportation against him had not been met.

The administrative ruling in this case that the petitioner was statutorily ineligible for suspension in that he is ineligible for citizenship inhibited consideration by the Attorney General of the petitioner's application for suspension of deportation.

> Under §19(c) of the Immigration Act the exercise of the Attorney General's appropriate discretion in suspending deportation is prohibited in the case of aliens ineligible for citizenship. The alien is determined to have a proscribed status by [an] administrative ruling of ineligibility. * * * [T]he alien can remove the bar to consideration of suspension only by a judicial determination of his eligibility for citizenship. *McGrath* v. *Kristensen*, 340 U. S. 162, 169 (1950).

The petitioner instituted this action for a declaration which would "remove the bar to consideration of suspension by the Attorney General," erected by the erroneous administrative ruling on his suspension application, and an injunction against his deportation because such consideration had not been had. The efficacy of the action, were he to succeed, would be two-fold. First, it would result in a judicial declaration such as that envisioned by the Supreme Court in the *Kristensen* case:

> * * * a determination that [he] is not barred from citizenship by §3(a) of the Selective Training and Service Act of 1940 only declares that he has such status as entitles him to consideration under §19(c) of the Immigration Act. (at 171).

Secondly, it would restrain the respondent, the District Director of Immigration and Naturalization, from effecting petitioner's deportation under the existing order and pending the determination of the application for suspension of deportation. *Accosta* v. *Landon*, *supra* at 141.

The petitioner is not, in the present posture of his application for suspension, entitled to the relief of having his deportation suspended. If his contention is correct that he is not statutorily ineligible for suspension, he has a right only to have suspension *considered* by the Attorney General and a right not to be deported until such consideration is had.

Were the bar to this consideration to be removed by court ruling, the proposed relief would not only be effective, but the only relief which the petitioner may presently claim.

The obstacle to consideration of his application by the Attorney General was not only *not* created by the Attorney General, but cannot be eliminated by him. It was a product of a decision of one of his subordinates, a Special Inquiry Officer [8 C. F. R. 242.61] made under the aegis of another of his subordinates who was before the court, the respondent District Director. Power to effect the petitioner's deportation, pending the removal of that obstacle, may be in the Attorney General, but it is, also in the hands of the District Director, and, undoubtedly, it may be effectively frustrated by restraint upon the District Director. *Shaughnessy* v. *Pedreiro, supra.*

In the *Vaz* case, Vaz's application for suspension was decided by the Commissioner of Immigration on "the assumption of the alien's eligibility for suspension of deportation and was a decision on the merits and not * * * solely on the basis of the alien's ineligibility for citizenship." *Vaz* v. *Shaughnessy, supra* at 72. The purport of the action was to contest the "appropriateness" of the Commissioner's conclusion, based on the assumption that "the plaintiff met the statutory requirements of eligibility," but that "the conceded facts precluded the granting of suspension" [*Id.* at 71], evaluated by this Court as "essentially a discretionary matter." *Pedreiro* v. *Shaughnessy, supra,* at 769. Vaz's application had been ripe for the exercise of discretion and that discretion had, in fact, been exercised. The relief which Vaz sought was the accomplishment of a suspension of his deportation by compulsion on the Commissioner or the Attorney General to reverse the conclusion which their discretion had dictated. By statute, such a reversal could be effected only by one or the other of those officers.

Under *Williams* v. *Fanning, supra,* read without the gloss put upon it by *Shaughnessy* v. *Pedreiro, supra,* it was possible for the court below, in the *Vaz* case, to have believed that an effective decree would "require [either the Commissioner or the Attorney General] to take action * * *". *Williams* v. *Fanning, supra,* at 493. The instant case, even under the same authority, calls for a conclusion other than that reached in *Vaz.* The relief requested here is not in the exclusive control of either the Attorney General or the Commissioner, and, in fact, is beyond their statutory authority. Effective relief will not require a decree against either of them "to take action". The declaratory aspects of a decree here, were it to be in the petitioner's favor, would simply free the Attorney General to take action in accordance with the governing statute, *i.e.,* to consider whether or not the petitioner's deportation should be suspended. Neither would it be necessary for the injunctive aspects of the decree, a prohibition against the petitioner's deportation, to run against the Attorney General. *Shaughnessy* v. *Pedreiro, supra.*

Accosta v. *Landon, supra,* presented a situation on all fours with the instant case. *See also*: *Jiminez* v. *Barber, supra.* As here, a Special Inquiry Officer denied an application for suspension of deportation on the ground that he "thought Accosta was statutorily ineligible therefore." (at 439). As here, an action was brought against the District Director of Immigration and Naturalization to review the legal validity of the administrative decision on eligibility and the deportation order whose continuing viability derived from that erroneous decision. The court in the *Accosta* case declared the administrative decision to be contrary to law and enjoined enforcement of the deportation order thus derivatively invalid, stating:

> The statutes * * * and the federal regulations, * * * entitle a deportable alien who has made timely applica-

tion for suspension of deportation to an exercise of the Attorney General's discretion on such application. Here Accosta was deprived of the exercise of the discretion because the Attorney General's subordinates erroneously thought he was "statutorily ineligible" for suspension of deportation.

The courts may not suspend the deportation of a deportable alien as that discretionary power is vested solely in the Attorney General, 8 U. S. C. A. §1254. *However, when the Attorney General is required as a condition precedent to an order of deportation to exercise his discretion with respect to the suspension of deportation, the validity of the order must rest upon the needed exercise of discretion. If it is lacking, the order is ineffective.* (at 441) [Emphasis added.]

The District Court and the court below in the instant case hesitated to follow the pattern of the *Accosta* case for fear that the relief of enjoining deportation as the auxiliary aid to a declaration of the legal invalidity of the administrative determination of the petitioner's statutory ineligibility for suspension would be ineffective. The District Court, for example, declared.

> *Effective* relief cannot be granted merely by preventing the District Director from deporting an admittedly deportable alien. * * * Without compelling the Attorney General to exercise such discretion, the plaintiff will continue in the status *ad infinitum* of an alien clearly deportable for failure to continue in transit to Mexico. The District Director can never alter plaintiff's status as an admittedly deportable alien; only the attorney general, *notwithstanding such deportability*, can suspend his deportation. (26a) [Court's emphasis.]

This Court, in *Shaughnessy* v. *Pedreiro*, *supra*, had just such a technical consideration urged upon it. It noted:

"It is argued, however, that the Commissioner should be an indispensable party because a judgment against a District Director alone would not be final and binding in other immigration districts." (at 53). The Court refused to be bound by such formalism, and, on the basis of "practical considerations", ruled:

> [W]e need not decide the effect of such a judgment. We cannot assume that a decision on the merits in a court of appeals on a question of this kind, subject to review by this Court, would be lightly disregarded by immigration authorities. *Id.*

It is no less proper an assumption that, in the situation presented by the instant case, a declaratory judgment that the plaintiff is not ineligible to United States citizenship and eligible for suspension would be "lightly disregarded" and the alien permitted to remain "in the status *ad infinitum* of an alien clearly deportable" by immigration standards, but undeported for failure of the "condition precedent" to the "effectiveness" of the outstanding order of deportation. In any event, the restraint on the alien's deportation would serve to enforce his right not to be deported under an order which has no legal effectiveness because the Attorney General had not exercised his discretion with respect to the application for suspension of deportation. To the extent that the instant action is, derivatively, an attack on the order of deportation [*see*: *Accosta* v. *Landon*, *supra*], the District Director is a proper party to the suit, and, under *Shaughnessy* v. *Pedreiro*, *supra*, neither the Attorney General nor the Commissioner are indispensable parties. To the extent that the court below, in *Vaz* v. *Shaughnessy*, *supra*, did not view the challenge there in such perspective, that decision rests upon an infirm legal base.

That error aside, however, it is quite clear that this Court in the *Pedreiro* case did not contemplate that its

rationale should countenance the distinction in result, maintained by this Court, between *Pedreiro* and *Vaz*. *See*: *Pedreiro* v. *Shaughnessy, supra,* at 769. This Court not only did not distinguish between *Pedreiro* and *Vaz*, as did the court below [*id.*], but it lumped both types of cases in stating its rejection of the Government's claim to the indispensability of the Commissioner as a party. At page 52, the Court stated: "We also reject the Government's contention that the Commissioner of Immigration and Naturalization in an indispensable party to an action for declaratory relief." Footnote 7 states: "Compare *Paolo* v. *Garfinkel,* 200 F. 2d 280; *Rodriquez* v. *Landon,* 212 F. 2d 508." The *Paolo* case was an action, like *Pedreiro* to review the validity of a deportation order. The *Rodriquez* case, however, was a suit not even like the instant case which seeks merely to clear the way of the bar created by subordinate officials to consideration of suspension by the Attorney General, but one like *Vaz* where the Commissioner, after consideration and in the exercise of his discretion, denied an application for suspension. Most importantly, however, the rational evaluation of practicalities adopted by the Supreme Court in *Pedreiro* override the theoretical fears which governed the decision of the court below in *Vaz* and eliminate *Vaz* as a valid authority.

Whether or not, therefore, this case is a *Pedreiro* case or a *Vaz* case is rendered of no moment by the authority of *Shaughnessy* v. *Pedreiro, supra.* But, if the distinction is held to persist, the instant case is, at least, not a *Vaz* case in that an effective decree here will require no action to be taken by the Attorney General or Commissioner. On the contrary, as in *Williams* v. *Fanning, supra,* as construed and extended by *Shaughnessy* v. *Pedreiro, supra,* "it will effectively grant the relief desired by expending itself on the subordinate official who is before the court."

The court below was, therefore, clearly in error in its determination that the Attorney General or Commissioner of Immigration and Naturalization were indispensable parties to this suit. Proper parties were before the court and no indispensable party was lacking. The petitioner's complaint should have been considered on the merits and the relief it requested granted.

2. Petitioner, not having been relieved of liability for military service as required by law and prescribed by Selective Service regulations is not debarred from citizenship and is not ineligible for suspension of deportation.

The Court below held that petitioner was statutorily ineligible for suspension of deportation because it was of the opinion that the mere signing by petitioner of an *Application to be Relieved from Military Service* operated, *ipso facto* to debar him from citizenship irrespective of whether or not he was thereafter relieved of liability for and exempted from such military service by reason of the said application.

Petitioner contends that the Court is in error, both under Section 3(a) of the Selective Service Act of 1940 [50 U. S. C. App. (1946 Ed.) §303(a)] and §315 of the Immigration and Nationality Act of 1952 [8 U. S. C. §1426]. The law now is, and at all times pertinent herein has been that permanent ineligibility for citizenship results only when the two-fold factors exist: application for *and* relief from military service because of alienage. Since petitioner was never exempted from or relieved of liability from military service because of alienage the decision of the court below was error and should be reversed.

A. Application and relief from military service are both required as prescribed under §3(a) of the 1940 Selective Service Act [50 U. S. C. App. (1946 Ed.) 303(a)] and the applicable Selective Service regulations as a bar to naturalization.

Since the adoption of the Selective Service Act of 1918,[5] the law has made provision for the exemption from service and training in the United States armed forces of aliens, nationals of neutral nations, residing in the United States. The concomitant of *exemption,* however, was perpetual debarment from United States citizenship. Court decisions early recognized that debarment from citizenship was a penalty for relief from liability for military service and that where no such relief was had, there existed no warrant for the exaction of the penalty. *In re Gustavson,* 300 F. 251, 252 (D. C. S. D. Calif. 1924) held:

> The intention of the Act plainly was to fix a penalty where an alien declarant was relieved from military service; * * * in this case the government did not relieve the declarant from service, * * * hence no exemption right was accorded him and he should *not* be held to have incurred the penalty affixed. [Emphasis added.]

Accord: In re Siem, 284 F. 868 (D. C. D. Mont., 1922), *aff'd* 299 F. 582 (C. C. A. 9th, 1924).

The authorities, construing subsequent legislation substituting the 1918 provision, have consistently understood

5. Section 4, Act of July 1918 [40 Stat. 88] provided:
> * * * a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, * * * and he shall forever be debarred from becoming a citizen of the United States.

that a debarment from citizenship may occur only where the two factors, *in the conjunctive,* appear: application for relief from military service *and* exemption under the application, by classification in the prescribed exempt category therefor in accordance with the statute and promulgated selective service regulations. In every case where a forefeiture of the right to citizenship was declared both factors were present.[6] In no reported case was the penalty of debarment imposed where no relief from military service was a consequence of the application for exemption.

The current law on the subject is now also part of the Immigration and Nationality Act of 1952, Section 315 [8 U. S. C. §1426]. It was put there because as reported by the Senate Judiciary Committee, it was felt "that this provision is in line with the general concept of the Nationality Act" and "should be incorporated in the proposed bill so that all requirements for naturalization may be found in the same Act." [Sen. Jud. Rep. No. 1515, 81st Congress 2nd Sess. p. 725].

The legislative history of its enactment further reveals that Section 315 as written and adopted was not intended to nor did it in fact constitute a change in the law as it had theretofore prevailed. On the contrary it represented congressional understanding of the extant law. The committee,

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6. *Barreiro* v. *Brownell*, 215 F. 2d 585, 587 (C. A. 9th, 1954); *Benzian* v. *Goodwin*, 168 F. 2d 952, 954 (C. A. 2, 1948); *In re Mauderli*, 122 F. Supp. 241, 242 (D. C. N. D. Fla., 1954); *In re Ballester*, 119 F. Supp. 629, 631-2 (D. C. D. P. R., 1954); *Petition of Berini*, 112 F. Supp. 837, 838 (D. C. E. D. N. Y., 1953); *Petition of Miranda*, 111 F. Supp. 481 (D. C. E. D. N. Y., 1953); *In re Molo*, 107 F. Supp. 137 (D. C. S. D. N. Y., 1952); *Application of Mannerfrid*, 101 F. Supp. 446, 447 (D. C. S. D. N. Y., 1951); *In re Bartenbach*, 82 F. Supp. 649 (D. C. W. D. Pa., 1949); *Petition of Perez*, 81 F. Supp. 591 (D. C. E. D. N. Y., 1948). The cases cited by the Board of Immigration Appeals (97a) are among those cited here.

in recommending its passage, described it as embodying "the essential provisions of Section 4(a) of the Selective Service Act of 1948" [Sen. Jud. Rep. No. 1515, supra p. 717]. Indeed, Section 4(a) has remained on the statute books. It has not been repealed or replaced by Section 315; both provisions remain as companion statutes. And Section 4(a) was a re-enactment in *haec verbae* of Section 3(a) of the Selective Training and Service Act of 1940 [50 U. S. C. (1946 Ed.) App. 303, (a)] under which petitioner here had signed the application.

It is therefore significant that Section 315 is explicit in its incorporation of both factors—application and relief—*in the conjunctive*: "any alien who applies or has applied for exemption * * * on the ground that he is an alien, *and* is or was relieved * * * on such ground, shall be permanently ineligible to become a citizen of the United States." This law has been construed in a manner warranted by its clearly expressed language:

> * * * it will be seen that two conditions are requisite to the permanent ineligibility to citizenship on the part of an alien; (a) the application for exemption on the ground of alienage, and (b) that he "was relieved or discharged from such training or service on such ground."
>
> These requisites are not stated in the disjunctive, and if either fails the statutory ineligibility does not become automatic, for one is of equal importance to the other. *Petition of Caputo,* 118 F. Supp. 870, 871 (D. C. E. D. N. Y., 1954).

It must consequently follow that former Section 3(a) now Section 4(a) also requires as a condition for forfeiture of eligibility for naturalization both application *and* exemption. Otherwise Section 4(a) and Section 315 are in conflict and incompatible.

The petitioner did sign DSS Form 301, *Application by Alien for Relief from Military Service.* He was never, however, classified as exempt or granted relief from military service and training as a consequence of the execution of this application form. That he was not relieved from service by virtue of his alienage cannot be disputed.

The regulations operative at the time the petitioner signed DSS Form 301 established a specific *modus operandi* to effect, under the Selective Service law, an alien's exemption from military service because of alienage. Section 622.43(b) of 32 C. F. R. (Cum. Supp. 1943) provided that an alien registrant of a neutral country who files a DSS Form 301 with his local board "shall be placed in Class IV-C."[7] Section 623.1 of the regulations prescribed prompt classification of a registrant in accordance with stated principles. Section 623.61 made mandatory the mailing to the registrant of notice of his classification, the proper recording in the Selective Service files of such classification and of the mailing to him of the notice of classification. Not until all of these steps had been completed was the alien classified as exempt and exempted. Until the completion of the prescribed classification procedure his liability for service and training remained unimpaired.

None of the specified steps leading to exemption were taken with respect to the DSS Form 301 signed by the petitioner. He was at no time classified IV-C; the Selective

7. §622.43(b) provides: "When an alien registrant who is a citizen or subject of a neutral country (see §601.12) at any time prior to his induction into the land or naval forces of the United States files with his local board an application by Alien for Relief from Military Service (Form 301) executed in duplicate, he shall be placed in Class IV-C. The local board shall forward the original of such form to the Director of Selective Service through the State Director of Selective Service, and shall retain the duplicate in the registrant's cover sheet (Form 53)."

Service files do not record or in any way reflect a IV-C classification; no notice by mail or otherwise of a IV-C classification was sent to petitioner; and finally, the Selective Service files do not record the mailing of any such notice to petitioner [8] (R. 12a, 14a).

Quite the contrary, on January 27, 1944, five months after petitioner signed the DSS Form 30, he was classified 1-A —*available for military service*—notified of the classification and directed to appear for pre-induction physical examination on a date certain. The Selective Service files duly record this 1-A classification and the mailing of notice of that classification. The petitioner accepted the classification and appeared, as ordered, for physical examination. Only his failure to meet the physical requirements of the armed forces prevented him from serving and resulted in his reclassification as IV-F (R. 68a). The IV-F reclassification was made by the Board on March 2, 1944. Again, this reclassification with appropriate notice to appellant is duly recorded in the Selective Service files.

B. Petitioner is eligible for naturalization under the present statute §315 of the Immigration & Nationality Act, 1952 (8 U. S. C. §1426).

It is submitted that petitioner is not ineligible for naturalization by reason of having signed Selective Service Form DSS Form 301. The applicable statute is Section 315 of the 1952 Immigration & Nationality Act [8 U.S.C. §1426]. Subdivision (a) thereof reads as follows:

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8. §315(b) of the 1952 Immigration & Nationality Act makes the records of the Selective Service System "conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien." (See *supra*, p. 4.)

> *Notwithstanding the provisions of Section 405(b)[9] of this Act, any alien who applies or has applied for exemption* or discharge from training or service in the Armed Forces of or in the National Security Training Corps of the United States *on the ground that he is an alien, and is or was relieved* or discharged from such training or service *on such ground, shall be permanently ineligible to become a citizen of the United States.* (Emphasis added.)

The italicized language in the aforesaid statute highlights that its provisions—and they alone—are to be determinative of the eligibility for naturalization of any alien where eligibility is in issue because of an application made at *any* time for exemption from military service on the ground of alienage.

The Court of Appeals for the District of Columbia recently so construed and applied this section in *United States* v. *Bazan*, 228 F. 2d, 456. In that case Bazan was applying for naturalization. It appeared that in November 1942, he had filed under Section 3(a) of Selective Service Act of 1940, Selective Service Application, Form DSS 301, claiming exemption as a neutral alien, from military service. He had sought to withdraw this application in September 1943, but the Selective Service refused to permit it. Apparently there was no evidence in the record before the court that he had been relieved from military service because of his application. On these facts the Court of Appeals ruled that he was not ineligible for citizenship and stated:

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9. Section 405(b) provides: Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.

> * * * to debar appellee (Bazan) from citizenship, the statute requires proof not only that he applied for exemption on grounds of alienage but also that he was relieved from serving for that reason. The examiner's legal conclusion that appellee was relieved from 'military service because of alienage' is not supported by any evidence in the present record, * * *. We think the total absence of any such essential evidence is a sufficient basis for affirming the District Court's order granting naturalization.

In the case at bar the record not only establishes that petitioner was "not relieved from military service because of alienage" but affirmatively shows that he was in fact classified I-A, held liable and called up for service.

Under the decision in the Bazan case the petitioner could not be held ineligible for citizenship because of signing DSS Form 301. This is in direct conflict with the holding of the court below.

CONCLUSION

Wherefore, in view of the gravity of the questions raised and their importance to many aliens residing here, petitioner prays that this petition for writ of certiorari to the United States Court of Appeals for the Second Circuit be granted, and that this Court review and reverse the order dismissing petitioner's complaint.

Respectfully submitted,

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